Supreme Court, U. S.
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No. 74-100

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner has filed a supplemental memorandum annexing (1) the first page of his 1973 tax return (Form 1040), (2) his letter to the Internal Revenue Service explaining his claim of the Fifth Amendment privilege with respect to the return and (3) a letter to him from the Service stating that his filing "is not a return within the meaning of the Internal Revenue Code" (Pet. Supp. Exh. C, p. 4). It is not possible to tell, on the basis of this information, whether the Service acted properly in rejecting his 1973 return or whether his sweeping claim of privilege (Pet. Supp. Exh. B, pp.

2-3) was legally adequate.[1] However, what is clear is that the incident is irrelevant to the question presented in the petition, which concerns the admissibility of certain limited information from returns on which no claim of privilege was made.

If the Service improperly rejected petitioner's 1973 return (a question on which we intimate no view), that would of course bear upon any litigation that may hereafter arise regarding petitioner's 1973 tax liability and filing obligations. That has nothing, however, to do with the instant case.

For this reason and the reasons stated in our Brief in Opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[1]The only use of petitioner's 1965-1967 tax returns at his trial related to his statement of occupation and of the source of his income (Br. in Opp. 5, n. 6). On the portion of the Form 1040 reproduced by petitioner, his only claim of the Fifth Amendment privilege against self-incrimination was his refusal to state his occupation. However, petitioner's failure to state his occupation (or source of income) was not the basis for the rejection of the return. We are advised by the Internal Revenue Service that petitioner's Form 1040 for 1973 was considered an inadequate filing because it showed, in line 48, "net taxable income," but did not show gross income or deductions used in arriving at that amount. Hence the Form 1040 did not disclose sufficient facts to enable the Service to determine petitioner's correct tax liability. In consequence, the Service concluded that petitioner's filing was "not a return within the meaning of the Internal Revenue Code." Cf. *United States* v. *Porth*, 426 F. 2d 519 (C.A. 10).